No. 861.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
Petitioner,

vs.

KATHERINE HARMAN, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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I.

OPINIONS OF THE COURTS BELOW.

As stated by petitioner, the opinion of the San Antonio Court of Civil Appeals, though not officially reported, is reported by the National Reporter System as *United Services Automobile Association vs. Harman, et al.*, 151 S. W. (2d) 609, and is set out in the printed record at pages 153-157.

The Supreme Court of Texas, without written opinion, dismissed the petition for writ of error filed by petitioner, for want of jurisdiction, and with the adjudication that the judgment was correct (R. 176).

The effect of this adjudication by the Supreme Court of Texas was an approval of the judgment rather than an express approval of the principles of law announced by the Court of Civil Appeals—*Republic Ins. Co. vs. Highland Park Independent School District,* 133 Tex. 545, 125 S. W. (2d) 270. It is therefore necessary to note the judgment of the Trial Court and the various fact findings therein which support such judgment. The Trial Court judgment is set out in the printed record on pages 137-141 inclusive.

II.

JURISDICTION.

Respondents respectfully submit that the petition for writ of certiorari should be dismissed without jurisdiction by this Honorable Court, because:

(1) It appears from the record in this case that the judgment of the Supreme Court of Texas rests upon an adequate non-Federal ground, in that it affirmatively appears that Oliver Lawther—defendant in the Maryland judgments—in each of such Maryland proceedings, was served not only as a non-resident under sections 190-a and 190-b of Art. 56 of the *Annotated Code of Maryland* (R. 96-98), but also that thereafter, before judgments were amended and placed in final form, process was delivered to and received by him in person (R. 56, 59, 74, 79).

(2) No Federal question is presented, and the judgment of the Supreme Court of Texas rests upon an adequate non-Federal ground, in that it affirmatively appears from the record that the Texas Trial Court found specifically that under the facts and evidence of this particular case, the Maryland defendant, Oliver Law-

ther, when served with process out of the Maryland courts, was a non-resident of both the Federal Reservation and the State of Maryland, as determined by applying the test and meaning of the term "non-resident" announced by the Court of Appeals of Maryland in the case of *Wagner vs. Scurlock*, 166 Md. 284, 170 Atl. 539, which case was plead and proved by the respondents (R. 8, 21, 106).

It therefore appears that the decision of this case turned upon a finding of fact under the law as announced by the court of last resort of the State of Maryland, where the judgments sued upon were rendered, which involved no infraction of any right granted or secured by the Constitution of the United States.

(3) No Federal question is presented, and the judgment of the Supreme Court of Texas rests upon an adequate non-Federal ground, in that it affirmatively appears from the record that the Maryland defendant, Oliver Lawther, was an unemancipated minor at the time he enlisted as a soldier in the State of Texas, and at the time the collision occurred, in which respondents were injured, and under the general law of both Maryland and Texas, the residence of an unemancipated minor follows that of his father.

(4) The judgment of the Supreme Court of Texas rests upon an adequate non-Federal ground, in that it affirmatively appears from the record that the Texas Trial Court found specifically that under the evidence in this case the Maryland defendant, Oliver Lawther, when served with process out of the Maryland courts, was a non-resident of the State of Maryland, because of the law announced by the Court of Appeals of Mary-

land in the case of *Lowe vs. Lowe*, 150 Md. 594, 133 Atl. 729 (plead and proved by respondents—R. 7-8, 21, 105), wherein the Maryland court held that a person residing on a Federal Reservation in the State of Maryland was not a resident of Maryland, even though the Maryland Legislature in ceding the reservation to the Federal Government, reserved the right to serve process therein; such case following the law announced by the Supreme Court of the United States in the cases cited therein that service of process in such reservation is the action of the Federal Government, and that the action of the State officer in that connection is as an officer of the United States for that purpose. It therefore appears that the judgment of the Texas Court turned upon a finding of fact bringing the case within a controlling proposition of law announced by the Court of Appeals of Maryland, which in no way involves the infraction of any right granted or secured by the Constitution of the United States.

(5) No substantial Federal question is presented, and the judgments of the Supreme Court of Texas and the Texas Trial Court are founded upon adequate and substantial non-Federal grounds, in that it affirmatively appears from the record:

(a) That service under Sections 190-a and 190-b of Art. 56 of the *Annotated Code of Maryland* (R. 96-98) has been construed by the Court of Appeals of the State of Maryland, in the case of *Employer's Liability Assurance Corp. vs. Rody P. Perkins*, 169 Md. 269, 181 Atl. 436 (which was plead and proved by respondents—R. 7, 19-20, 105) to be sufficient to confer jurisdiction over the person of a non-resident;

(b) That petitioner does not question that all requirements of such statutes were strictly complied with, and that the Maryland defendant, Oliver Lawther, received the process and a copy of the pleading in each of said Maryland suits in time to have appeared and defended them;

(c) And that petitioner does not question the Constitutionality of Sections 190-a and 190-b of Art. 56, it appearing that same have been held constitutional by the Maryland court in the opinion set out in (a) above, and that such statutes in all things comply with the requirements as announced by this Honorable Court in the cases of *Hess vs. Powloski*, 47 S. Ct. 632, 274 U. S. 352; *Kane vs. New Jersey*, 37 S. Ct. 30, 242 U. S. 160; *Wuchter vs. Pizzuti*, 48 S. Ct. 259, 276 U. S. 13.

It therefore affirmatively appears that this case rests solely upon findings of fact made by the Trial Court after a full hearing of the evidence, and that such findings of fact were gauged by and turned upon principles of law announced by the State Courts of Maryland and Texas, which in no wise involved or resulted in the infraction of any right granted or secured by the Constitution of the United States.

(6) No Federal question is involved herein, and the judgment of the State Court rests upon adequate non-Federal grounds, in that it affirmatively appears from the record that

(a) The Maryland defendant, Oliver Lawther, delivered to the petitioner, indemnitor, all process served upon him in the Maryland cases;

(b) That petitioner, prior to the date answer was required in the Maryland suits, refused to appear and de-

fend the Maryland defendant, Lawther, in such cases, giving as sole reason therefor its contention that Lawther, on the occasion of injury to respondents, was driving the automobile belonging to the named insured, Lt. Parker, without the latter's permission, which contention was found against petitioner by the Texas Trial Court jury;

(c) That petitioner appeared by attorney in the Maryland suits in behalf of the named assured, Lt. Parker, who was also named therein as a defendant and served with process in the same manner as Lawther;

(d) That petitioner, through its attorneys, had knowledge at the time that personal judgments were rendered against Lawther by the Maryland courts, and that no appeals were prosecuted therefrom; and

(e) That the policy of insurance sued on was an indemnity contract, under the terms of which respondents, upon the rendition of judgments in the Maryland Courts, acquired rights co-extensive with the rights of the additional insured, Lawther, to sue the petitioner for the amount of said judgments within the limits of said policy.

It therefore affirmatively appears that petitioner, as indemnitor of Lawther, and party ultimately liable, having groundlessly refused to appear and defend Lawther after full and fair notice of the pendency of the Maryland suits, with full opportunity to defend the same, is bound by such judgments on the principles of estoppel which were fully plead and proved by respondents.

(7) No substantial Federal question is presented, and petitioner is not in a position to present a Federal question, in that it is not asserted that petitioner itself has

been denied any right guaranteed by the Federal Constitution. It affirmatively appears from the record that the Maryland defendant, Oliver Lawther, has never questioned the sufficiency of the Maryland service upon him; that he has never contended that he was at any time a resident of that state; and that petitioner having groundlessly refused to defend him in the Maryland cases, as required by the policy, is in no position now to assert that Lawther was denied some Federal right in those causes.

III.

STATEMENT OF THE CASE.

(As the Maryland judgments were recovered by respondents under their maiden names of Katherine Harman and Elizabeth Amend, and the Texas suits were instituted by respondents in their maiden names, their husbands joining in pro forma after the institution of such suits, respondents will be referred to by their maiden names of Katherine Harman and Elizabeth Amend).

Each of respondents filed a separate suit in the Trial Court of Bexar County against the United Services Automobile Association, which suits were consolidated by agreement of the parties and tried as one suit (R. 27).

Respondents plead and proved recovery of separate judgment for damages in courts of general jurisdiction of the State of Maryland against one Oliver Lawther, also known as Oliver Lowther, for injuries sustained in an accident when a car belonging to Lt. Parker and being driven by said Lawther collided with a car in which respondents were riding in the City of Baltimore, Maryland on April 11, 1937. (Pleading Katherine Harman,

R. 1-2; Elizabeth Amend, R. 14-15) (Evidence Authenticated Judgment Record Superior Ct. of Baltimore City—Katherine Harman, R. 42-60; Authenticated Judgment Record Court of Common Pleas, Baltimore City—Elizabeth Amend, R. 61-81.)

Respondents plead and proved, and the Texas Trial Court jury found, that Oliver Lawther, on the date of such collision, was driving an automobile belonging to Lt. Daniel Parker with the latter's permission. (Pleading—Katherine Harman, R. 10, par. 11; Elizabeth Amend, R. 23, par. 11). (Evidence—Testimony of Oliver Lawther, R. 93-96.) (Jury Findings—R. 133.) (Judgment of the Texas Trial Court, R. 138.)

Respondents each plead that petitioner had issued a policy of automobile liability insurance to Lt. Daniel Parker covering the automobile involved in the collision with respondents, in force at the time of respondents' injuries, which it was alleged by its terms covered Oliver Lawther as an additional insured, since he was driving the car with permission of the named insured (Pleading of Katherine Harman, R. 8-10; Elizabeth Amend, R. 21-23).

The policy of insurance sued upon, which was introduced in evidence by respondents (R. 92a-92d) provided:

"UNITED SERVICES AUTOMOBILE ASSOCIATION

Section 1. Does hereby agree with the insured named in the Declarations made a part hereof, * * *

COVERAGE A—BODILY INJURY LIABILITY

To pay on behalf of the insured for all sums which the insured shall become obligated to pay by reason

of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury * * * sustained by any person or persons, caused by accident arising out of the ownership, maintenance or use of the automobile (R. 92b).

* * * * * *

Section 2. This policy includes the following provisions as respects Coverage A. * * *

(1) DEFINITION OF "INSURED" The unqualified word "insured" wherever used * * * includes not only the named insured but also any person, while using the automobile * * * provided * * * that the actual use is with the permission of the named insured (R. 92b).

(2) DEFENSE, * * * It is further agreed that as respects insurance afforded by this policy, the association shall:

(a) Defend in his name and behalf any suit against the insured, alleging such injury or destruction and seeking damage on account thereof, even if such suit is groundless, false, or fraudulent. * * * (R. 92b).

* * * * * *

SPECIAL CONDITIONS APPLICABLE ONLY TO COVERAGES A AND B.

NOTICE OF ACCIDENT * * * —If claim is made or suit is brought against the insured, the insured shall immediately forward to the association every demand, notice, summons, or other process received by him or his representative. * * *

ACTION AGAINST ASSOCIATION—No action shall lie against the association unless as a condition precedent thereto the insured shall have fully complied with all conditions hereof, nor until the amount of the insured's obligation to pay shall have been determined either by final judgment against the in-

sured after actual trial, or by written agreement of the insured, the claimant, and the association. * * *

Any person, or his legal representative, who has secured such judgment or written agreement, shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the insured. * * *

Bankruptcy or insolvency of the insured shall not relieve the association of any of its obligations hereunder." (R. 92c).

Service of Process Under the Non-Resident Service Statute.

Respondents each set out in their pleading Art. 56 of the 1935 supplement of the *Annotated Code of the Public Laws of Maryland*, providing for service upon non-residents who had accepted the rights and privileges of using the roads and highways of Maryland. (Katherine Harman R. 2-4, Elizabeth Amend, R. 15-17).

Sections 190-a and 190-b of Art. 56, properly authenticated, which was introduced in evidence by respondents (R. 96-98), provided:

(a) That the acceptance by a non-resident individual of the rights and privileges of using the roads and highways of Maryland by operating a motor vehicle thereon shall be deemed equivalent to an appointment by him of the Secretary of State as such non-resident's attorney for service for all legal process in any action against him growing out of any accident or collision in which such non-resident may be involved while operating a motor vehicle on the Maryland highways;

(b) That acceptance by such non-resident of the use of the Maryland highways shall be a signification of

his agreement that service of process on the Secretary of State for him shall be of the same legal force and validity as if served on him personally;

(c) That service of such non-resident shall be made by leaving a copy of process with the Secretary of State, and shall be sufficient on such non-resident only if notice of such service and a copy of the pleading or declaration be sent by registered mail to such non-resident, and such non-resident's return receipt, along with an affidavit by the plaintiff or his attorney of compliance is filed with the Clerk of the Court in which such case is pending;

(d) That after such service of process upon the Secretary of State, and the delivery to such non-resident of notice of such process and copy of the pleadings in the cause, and the filing with the Clerk of the Court where such action pends of the return receipt, together with the affidavit by the plaintiff or his attorney of compliance with such statute, the non-resident defendant is given 60 days after the receipt of such notice and pleading by him, within which to answer in said cause; and

(e) If such non-resident defendant failed to answer within such 60 day period, the Court may grant judgment by default against such non-resident defendant upon motion by the plaintiff, unless the Court extend such period for answer.

Section 190-b of Art. 56 provides the form of the written notice to be served on such non-resident (R. 98).

Respondents plead the law of the State of Maryland as announced in the case of *Employers Liability Assurance Corporation vs. Perkins,* 169 Md. 269, 181 Atl. 436,

holding that the service provided for a non-resident under Sections 190-a and 190-b of Art. 56 is constitutional, and that such service is sufficient to confer jurisdiction over the person of a non-resident. (Katherine Harman R. 7, Elizabeth Amend, R. 19-20), an authenticated copy of the opinion of the Court of Appeals in such case was introduced in evidence in the trial in the Texas Court (R. 105).

Respondents each plead that Oliver Lawther was a non-resident of the State of Maryland, and of the Federal reservation at Ft. Hoyle at the time of the automobile accident in Baltimore on April 11, 1937, and the time of the institution of suit against him in the Maryland courts; and service on such defendant, in compliance with Sections 190-a and 190-b of Art. 56 was plead (Katherine Harman, R. 2-5; Elizabeth Amend, R. 15-18).

Authenticated copies of the entire judgment records in the Maryland suits were introduced in evidence, showing detailed compliance with Sections 190-a and 190-b of Art. 56, and receipt of such process by Lawther, and his signed, returned registry receipt therefor (Katherine Harman, R. 42-61; Elizabeth Amend, R. 61-81).

The witness, Oliver Lawther, testified that he received such process and delivered the same to petitioner, as required by the policy of insurance sued on (R. 96, 115-116).

Petitioner's general claims attorney testified by deposition taken by respondents that petitioner received from Oliver Lawther all citations and processes in each of the Maryland suits, as required by the policy sued on (R. 85).

Personal Service Upon Oliver Lawther.

Respondents each plead that after the rendition of the judgments in Maryland, each of said judgments were thereafter amended, and that process in connection with such amendments was served upon Oliver Lawther in person (Katherine Harman, R. 6-7; Elizabeth Amend, R. 18-19).

The authenticated judgment record of the proceedings in Maryland introduced by respondents, show personal service upon Oliver Lawther, shown by the Sheriff's return in each of said causes (Katherine Harman, R. 56; Elizabeth Amend, R. 74).

That Oliver Lawther was a Non-Resident of Maryland, and the Federal Reservation.

Respondents, in addition to pleading the non-resident statute above, also plead and proved the law of the State of Maryland announced in the case of *Wagner vs. Scurlock*, 166 Md. 284, 170 Atl. 539 (Pleading, Katherine Harman, R. 8, Elizabeth Amend, R. 21) (Evidence R. 106), wherein the Maryland Court lays down the test for determining whether a person is a non-resident within contemplation of the non-resident service statute. The Court said in that opinion: "While practically all of the decisions say intention is the controlling factor in determining residence, this Court said, in *Harrison vs. Harrison, supra,* it may be more satisfactorily shown by what is done than by what is said."

The Maryland defendant, Oliver Lawther, was placed on the stand as a witness and testified:

(a) That he was living at Big Springs, Texas when he enlisted in the Army in 1935 (R. 110) and at that

time he set out on his enlistment application that his home was Big Springs, Texas (R. 112).

(b) That shortly after his enlistment, his mother and father moved to Enid, Oklahoma (R. 112, 117), and that when he re-enlisted in November of 1937, he gave as his home Enid, Oklahoma (R. 112).

(c) That when he enlisted he was under the age of 21, and that he was under 21 years when the collision occurred (R. 112); that he became 21 on August 24, 1937, and that he was over 21 when he re-enlisted in November of 1937 and gave Enid, Oklahoma, as his home (R. 113).

(d) That he was calculating to stay in the Army; that he was not sure that he intended to return to his home when his enlistment was over (R. 113).

(e) That he was transferred to Ft. Hoyle, Maryland, from Ft. Bliss, Texas, in October 1935, Ft. Hoyle being a Government reservation about 60 miles from Baltimore, Md. (R. 112).

(f) That he had never been to Baltimore until he was transferred to Ft. Hoyle as a soldier (R. 113).

(g) That he could not leave the post without permission from his superior officer, and at all times was under the direction of his superior officers as to the place he slept, time he arose in the morning, and even set the time he ate and the clothes he wore (R. 114-115).

(h) That he had never rented any property or rooms in Maryland, but had stayed at the barracks where he was stationed on the Federal reservation (R. 114).

(i) That he had no relatives in the State of Maryland, and that he acquired no business connections or any property of any kind, in the State of Maryland (R. 115).

(j) That he went to Ft. Hoyle, Maryland, because the United States Government transferred him there; that he remained there on the Federal reservation as long as the United States Government told him to, and that he would have left there any time the Government ordered (R. 114).

(k) That he did not have a Texas driver's license when he transferred to Ft. Hoyle, Maryland; that he procured a driver's license from the United States to drive on the Federal post and beyond (R. 115).

(l) That he never drove on the roads of Maryland until he procured a Maryland driver's license (R. 116).

(m) That at the time the collision occurred, he was driving on the roads of Maryland (R. 116).

Section 186 of Article 56 of the *Maryland Code* was introduced in evidence by respondents. This section required all persons—without reference to whether they were resident or non-resident of the State of Maryland—to procure a driver's license before operating a motor vehicle upon any highway of the State of Maryland, and such section required the Commissioner, before granting such license, to require an actual demonstration of the qualifications of the persons applying for such license (R. 100-102).

Section 190 of Article 56 of the *Maryland Code* was introduced by respondents, which section permitted non-residents to operate automobiles in Maryland without a Maryland license, only if such non-resident was properly licensed to operate a vehicle under the laws of the state of his residence, and such state required an examination as to qualification to operate a motor vehicle as

a condition for procuring such license; and provided further that such other state extended the same privilege to residents of the State of Maryland. Such exception from procuring a Maryland license by such statute did not apply to non-residents who have temporary residence in Maryland for periods in excess of three months in any year, or to non-residents in transporting persons or property for hire (R. 99-100).

Respondents plead and proved the law of the State of Maryland as announced in the case of *Lowe vs. Lowe*, 150 Md. 594, 133 Atl. 729 (Pleading Katherine Harman, R. 7-8; Elizabeth Amend, R. 20-21). (Evidence R. 105). In this case the Maryland Court held that persons residing on a Federal reservation in the State of Maryland were not residents of the State of Maryland.

The Texas Trial Court found in its judgment rendered upon the jury verdict and the evidence in this cause, that under the evidence in this cause Oliver Lawther, at the time of the collision on April 11, 1937, and the time of service of process upon him, was a non-resident both of the Federal reservation at Ft. Hoyle, and of the State of Maryland, within contemplation of the Non-resident Service Statutes and the General Laws of the State of Maryland, and that he received sufficient service of process in each of the Maryland suits (R. 138-139).

Petitioner Bound by the Maryland Judgments.

Respondents plead that petitioner was indemnitor of Oliver Lawther under its policy, received all process and citations served upon Lawther out of the Maryland courts before judgments were rendered therein, was given full opportunity to defend such suits, and that defense was refused upon the sole asserted ground that

Lawther was driving Lt. Parker's car without the latter's permission, it being alleged that petitioner having groundlessly refused to defend Lawther as required by the policy, it is bound by the Maryland judgments (Katherine Harman, R. 11-13; Elizabeth Amend, R. 25-26).

Lt. Parker testified that he was served with process out of the Maryland courts as a non-resident, and that such process was sent to the petitioner, as required by the policy (R. 108-109).

The authenticated Judgment Records of the cases in Maryland show service upon Lt. Parker as a non-resident, and appearance in his defense by petitioner's duly authorized attorney, Edwin W. Wells (Katherine Harman, R. 49-50; Elizabeth Amend, R. 67-68).

Mr. Max Weir, head of petitioner's Claim Department, and one of its attorneys in fact, testified by deposition taken in the Texas cases on September 16, 1938 (R. 83-91). A portion of Weir's testimony was as follows:

> "Q. Well, I believe that was the ground upon which you refused to pay off this judgment and refused to defend Mr. Oliver Lawther, was that the car was not being driven by Mr. Oliver Lawther with the permission of the named assured, Daniel Parker? A. That is correct.
>
> Q. Now what I am getting at—if there was any other thing with reference to that policy that prevented the United Services Automobile Association from defending that policy and paying off that judgment, you are not now familiar with it? A. The sole basis upon which the denial of liability was made was the lack of the authority of the party to operate the automobile (R. 84-85).
>
> Q. In other words, the United Services Automobile Association, through their duly authorized

agent, Mr. Edwin Wells, was furnished with all information, notices, citations, processes, etc., as required by the terms of this policy, as to each of those suits, to-wit: the suit instituted by Katherine Harman against Daniel Parker and Oliver Lawther in the Superior Court of Baltimore City, and the suit instituted by Elizabeth Amend against Daniel Parker and Oliver Lawther? A. Our attorneys, as I understand, had notice that suits were filed, yes sir.

Q. Your information as claims attorney for the United Services Automobile Association, is to the effect that your duly authorized attorneys in Maryland received notice of the filing of those suits in time to have defended them before judgments were rendered? A. Yes (R. 85-86).

Q. In other words, there is no contention made by the United Services Automobile Association that any of the exclusions set out in your standard form policy under the term "exclusions" would prevent coverage in this particular case? A. The sole basis of denial of liability is the lack of authority of Lawther to operate the car.

Q. After making a complete and thorough investigation of this accident through your duly authorized attorneys there, that is the sole basis the United Services Automobile Association has at this time for denying liability upon this policy in behalf of Oliver Lawther? A. That is the sole basis upon which we refused to defend these suits.

Q. Or to pay off these judgments to the extent of your policy limit? A. That is correct.

Q. You know from information included in your reports, that your attorneys, Wells & McCormick, appeared in the case filed in the Court of Common Pleas of Baltimore, Maryland, for May term 1938, by Elizabeth Amend against Daniel Parker and Oliver Lawther, and that your attorneys actually appeared

in behalf of and in defense of Mr. Daniel Parker, the named assured, don't you? A. I think that is correct.

Q. And you know that they specifically, upon your authorization, refused to appear at the same time in the same suit in defense of and in behalf of Oliver Lawther, who was also a defendant? A. I know they were so instructed.

Q. I say you know that the United Services Automobile Association instructed them before that case came on for trial, to appear in behalf of and in defense of Daniel Parker and not in behalf of and defense of Oliver Lawther? A. That is right.

Q. All right. Your failure in that case to have counsel appear for Oliver Lawther was with your full knowledge? A. Our direct instructions.

Q. And under your specific and direct instructions? A. Yes sir.

Q. And with full knowledge prior to the date of the hearing that Oliver Lawther was one of the parties named as defendant in that case? A. Yes.

Q. And with full knowledge that the United Services Automobile Association had received notice of the pendency of the suit prior to the date of the hearing against Oliver Lawther? A. Yes. * * * (R. 87-88).

Q. And in each case the sole reason for your refusal to defend Mr. Lawther was the fact, or was the company's contention, that Oliver Lawther was not driving this car on the occasion in question with permission or knowledge of the named assured, Daniel Parker? A. That is correct.

Q. Has the United Services Automobile Association taken any steps whatever to appeal either of these cases in behalf of Oliver Lawther? A. No.

Q. Has the United Services Automobile Association, by counsel, taken any steps whatever in be-

half of Oliver Lawther to set aside either of those judgments? A. No sir.

Q. And on all occasions since the date the judgments were entered, the United Services Automobile Association has had knowledge that Oliver Lawther was the named defendant in each of those cases, and that judgment was rendered against him in each of those cases? A. That is correct.

Q. Did you ever write a letter to Mr. Oliver Lawther or transmit information to him in any manner. that you would not defend him in the case of Elizabeth Amend vs. Daniel Parker and Oliver Lawther in the Court of Common Pleas of Baltimore City? A. He was so advised. Yes sir.

Q. Who advised him? A. He was advised through the office of Wells & McCormick.

Q. Did you ever advise Mr. Oliver Lawther, in any manner,—by correspondence, word of mouth, or in any manner, that you would not furnish him counsel to defend him in the case of Katherine Harman vs. Daniel Parker and Oliver Lawther? A. Yes.

Q. How was that furnished? A. Through the office of Wells & McCormick" (R. 89-90).

There was introduced in evidence by petitioner, a letter signed by the Maryland defendant, Oliver Lawther, which was prepared in the office of petitioner's Maryland attorneys, Wells & McCormick, under date of July 20, 1937, and addressed to Wells & McCormick, which was as follows:

"July 20, 1937.

Wells & McCormick,
1923 Fidelity Bldg.,
Baltimore, Md.

Gentlemen:

With reference to the matter of the suit or suits which have been instituted by Elizabeth Amend,

et al against Lt. Daniel Parker and myself, which are pending in the Court of Common Pleas of Baltimore City, I wish to state that I have been advised by Lt. Parker, as well as by Wells & McCormick, as attorneys for the United Services Automobile Association, that the United Services Automobile Association has declined any responsibility in the matter, in so far as I am concerned, and have refused to have counsel undertake the defense of the suits in my behalf.

I have also been informed by Lt. Daniel Parker and yourselves, that if I am to undertake any defense of the civil suits, it will be necessary for me to engage my own counsel to file pleas and undertake defense in my own behalf.

Very truly yours,

Oliver F. Lawther." (R. 110-111).

Oliver Lawther testified:

"Q. Did you or not employ counsel on your own hook? A. I did not." (R. 111).

Oliver Lawther's deposition was taken by respondents in the Texas cases on December 16, 1938, while Lawther was still stationed at Ft. Hoyle (R. 93), and in such deposition Lawther testified unqualifiedly in response to both direct and cross interrogatories that he was operating Lt. Parker's car at the time of the collision, with the latter's permission (R. 94-95). Such deposition was withdrawn from the registry of the Court at San Antonio by petitioner's Texas attorneys of record on February 4, 1939 (R. 93).

As soon as petitioner's Texas attorneys discovered in said deposition that Oliver Lawther had testified positively that he was driving the car with permission of

the named assured, Daniel Parker, they began to cast about for some other defense, and on February 14, 1939, the San Antonio attorneys wrote a private letter to the Maryland attorneys; copy of this private letter being identified and introduced by petitioner upon the trial of this cause. This letter shows that petitioner received notice and process served upon Oliver Lawther to amend the Maryland judgments. The first and last paragraph of said letter were as follows:

"February 14, 1939.

Wells & McCormick,
923 Fidelity Bldg.,
Baltimore, Md.

RE: Harman and Amend vs.
U. S. Automobile Ass'n.

Gentlemen:

I am in receipt from client of a similar petition filed by Rollins and one by Sokol in these cases to have the judgment amended, and for the first time I notice that the only service of summons had on Lawther in either of these cases was by registered letter addressed to him at Ft. Hoyle, Maryland, and I am wondering whether or not this particular provision of your statute has been tested as sufficient for a personal judgment under the doctrine of Pennoyer vs. Neff, as the thought occurs to me that even though he might be a citizen of some other state, if he was physically present in Maryland at the time of the filing of this suit, and of the delivery of the registered letter, some other methods of summons would prevail. * * *.

You may imagine my surprise when I read Lawther's depositions, and it occurs to me now that the most we can hope for is to have him present at the trial and go over the situation thoroughly and sell the jury on the idea that the Notary took advantage of him and did not truly transcribe either his an-

swers nor propound all of the questions, raising a question of fact as to his credibility in the depositions or from the witness stand.

Appreciating your prompt attention, I am

Yours very truly,

For Russell, McMillan & Russell.

William H. Russell/hh
CC: Mr. Max H. Weir" (R. 118-119).

After Lawther was transferred in October 1939 from Ft. Hoyle to Ft. Knox, Ky. (Lawther's testimony, R. 111), (Ward's Testimony, R. 83), the petitioner for the first time in its amended pleading filed in the Texas District Court on April 30, 1940, contended that Oliver Lawther was a resident of Maryland at the time process was served upon him as a non-resident (R. 28-40).

At no time in any portion of the record, either in Maryland or Texas, did Oliver Lawther assert that he was a resident of Maryland at any time.

The Texas Trial Court found in its judgment that all summons and process in each of the Maryland causes that were served upon Oliver Lawther, were immediately forwarded to and received by the United Services Automobile Association, in compliance with the terms of its policy No. MR-10863, issued to Lt. Parker, and that the United Services Automobile Association, after receipt of such process and notice, refused in each of said causes to appear and defend the said Oliver Lawther (R. 139).

IV.

REPLY TO PETITIONER'S SPECIFICATIONS OF ERROR.

1. Petitioner's contention that the Texas Court finding that Oliver Lawther was a non-resident of Maryland at the time he was served with process in the Maryland suits, discriminates against him as a soldier, and denies him equal protection under the law, is without merit, because the Court, after a full hearing of the evidence, applied the test applicable to all persons under the Maryland law, and determined that Lawther was a non-resident of Maryland upon three separate fact propositions, to-wit:

(a) Under the evidence it appeared that Lawther was in Maryland without any volition on his part, without any intention on his part to establish a residence there, and that no acts were shown indicating any intention to establish a residence in Maryland; but on the contrary, it appeared he intended for his residence to remain that of his parents, as indicated by his act in giving their residence as his home in his applications for enlistment and re-enlistment.

(b) Under the evidence, it appeared that Lawther was an unemancipated minor at the time of the collision, and that under the law of both Maryland and Texas, his residence followed that of his father, which was first in Texas and later in Oklahoma.

(c) Lawther was at all times stationed on a Federal reservation, and under the laws of Maryland, even if he be considered a resident of such reservation, he was not a resident of Maryland.

2. The adjudication by the Texas Court that Oliver Lawther was a non-resident of Maryland at the time of service of process upon him in the Maryland cases, was not a discrimination against him as a soldier, nor a denial of equal protection under the law. On the contrary, it would have been a discrimination against him as a soldier and a denial of equal protection under the law, if the Court had determined that under the evidence he was a resident of Maryland, because such a determination would have caused him to lose the residence of his choice, even though he was transferred to Ft. Hoyle without volition on his part, without intention to change his residence, and this, even though he had done no voluntary act indicating an intention to establish residence in Maryland.

3. The service of process upon Oliver Lawther under the non-resident statute of the State of Maryland, did not deprive him of property without due process of law, because such statute was strictly complied with, is constitutional under the authorities, and service thereunder sufficient to give the Court jurisdiction of the person of the defendant, the same as if served upon him personally.

4. The service of process upon Oliver Lawther as a non-resident under the non-resident statute of Maryland, at a time when he had a Maryland driver's license, did not deprive him of property without due process of law, nor deny him equal protection of the law, because the acquisition of a Maryland driver's license did not make him a resident of Maryland. On the contrary, it affirmatively appeared from the record that all persons, without reference to whether they are resident or non-resident of Maryland, are required by the laws of Mary-

lend to obtain a Maryland driver's license before driving on any road therein. (Sec. 186 of Art. 56 of the *Maryland Code*—R. 100-102). The only persons excepted from such requirement are non-residents of Maryland who hold a driver's license in the state of their residence, which license was granted under a law requiring an examination for qualifications to operate a motor vehicle, and then if such other state accords the same privilege to residents from Maryland (Sec. 190 of Art. 56 of the *Maryland Code* —R. 99-100). It also affirmatively appears from the record that Lawther, when transferred from Texas to Ft. Hoyle, did not have a Texas Driver's license.

V.

SUMMARY AND ARGUMENT.

Where it appears that the judgment of a State Court is based upon an independent, adequate, non-Federal ground broad enough to sustain it, such judgment will not be reviewed by the Supreme Court of the United States. *Utley vs. City of St. Petersburg*, 54 S. Ct. 593, 292 U. S. 106; *Richardson Machinery Co. vs. Scott*, 48 S. Ct. 264, 276 U. S. 128; *Broad River Power Co. vs. State of South Carolina, ex rel. Daniel*, 50 S. Ct. 401, 281 U. S. 537; *McCoy vs. Shaw*, 48 S. Ct. 519, 277 U. S. 302; *Enterprise Irrigation District vs. Farmers Mutual Canal Co.*, 37 S. Ct. 318, 243 U. S. 157.

The due process clause of the Federal Constitution does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable the Supreme Court of the United States to revise the decisions of the State Courts upon questions of state law. Where a question turns exclusively upon the law of the state, and involves no infrac-

tion of any right granted or secured by the Constitution of the United States, the State Court's decision is controlling. *Sayward vs. Denny,* 15 S. Ct. 777, 158 U. S. 180; *Castillo vs. McConnico,* 18 S. Ct. 229, 168 U. S. 674; *Enterprise Irrigation Co. vs. Farmers Mutual Canal Co.,* 37 S. Ct. 318, 243 U. S. 157; *Preston vs. Chicago,* 33 S. Ct. 177, 226 U. S. 447; *Louis & K. C. Land Co. vs. Kansas City,* 36 S. Ct. 647, 241 U. S. 419; *Old Colony Trust Co. vs. Omaha,* 33 S. Ct. 967, 230 U. S. 100.

Under the full faith and credit clause of the Federal Constitution, the validity and effect of the judgment of another state must be determined by the laws of that state. While a judgment rendered in one state may be challenged in another for want of jurisdiction over either the person or the subject matter, if the judgment on its face, as here, appears to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed, unless disproved by extrinsic evidence or the record itself. *Adams vs. Saenger,* 58 S. Ct. 454, 303 U. S. 59; *Milliken vs. Meyer,* 61 S. Ct. 339, 311 U. S. 457; Art. 4, par. 1 of the *Federal Constitution; Cook vs. Thornhill,* 13 Tex. 293; *Hanley vs. Donaghue,* 6 S. Ct. 242, 116 U. S. 1; *Tourtelet vs. Booker,* 160 S. W. 293; *Hastings vs. Bushong,* 252 S. W 246.

In construing the effect of a judgment of another state, the law of the state in which judgment was rendered is presumed to be the same as the law in Texas, unless proven to the contrary. *Walker vs. Garland,* 235 S. W. 1078, 220 S. W 397; *James vs. James,* 16 S. W. 1087; *Mitchell vs. San Antonio Public Service Co.,* 35 S. W. (2d) 140.

In this cause the Judgment Records of Maryland show personal service on the Maryland defendant, Oliver Law-

ther, before the judgments were amended, which showing we submit is decisive of the question and a complete answer to petitioner's contention.

In addition to personal service, the Maryland Judgment Records show service upon Oliver Lawther as a non-resident under the Maryland non-resident service statute. The Maryland non-resident service statute, Art. 56, Sections 190-a and 190-b being rather long, is copied in the appendix hereto. The constitutionality of the statute is not questioned by petitioner. It requires the non-resident to actually receive and receipt for notice of service and a copy of the pleading in the cause, and allows such non-resident 60 days thereafter within which to answer in said cause. Such statute is in almost exact language with the Massachusetts statute approved by this Honorable Court in the case of *Hess vs Powloski*, 47 S. Ct. 632-633, and the constitutionality of the same is unquestioned under the authorities. *Employers Liability Co. vs. Perkins*, 169 Md. 269, 181 Atl. 436; *Hess vs. Powloski*, 47 S. Ct. 632, 274 U. S. 352; *Kane vs New Jersey*, 37 S. Ct. 30, 242 U. S. 160; *Wuchter vs. Pizzuti*, 48 S. Ct. 257, 276 U. S. 13.

The Texas Trial Court heard the evidence set out under the statement above, and determined that under the law of Maryland and Texas, Oliver Lawther was a non-resident of Maryland at the time of the collision and service of process upon him. These findings are supported by three separate propositions of fact under three separate propositions of the state law, which in no wise infringe upon any right granted or secured by the Federal Constitution, to-wit:

First: Oliver Lawther is a non-resident because the evidence showed that there were no voluntary, overt

acts on his part evidencing any intention to establish a residence in Maryland. These elements are required under the law of Maryland applicable to all persons, and the fact that Lawther was a soldier would have made no difference in the Court's decision, if such elements had been present. *Wagner vs. Scurlock,* 166 Md. 284, 170 Atl. 539; *Suit vs. Shailer,* 18 Fed. Supp. 568; *Kinsel vs. Pickens,* 25 Fed. Supp. 455; *Gallagher vs. Gallagher,* 214 S. W. 516; *Houston Printing Co. vs. Tennant,* 39 S. W. (2d) 1089, 76 S. W. (2d) 762; *Evans vs. American Publishing Co.,* 13 S. W. (2d) 358, 16 S. W. (2d) 516; *Owens vs. Stovall,* 64 S. W. (2d) 360; *Morehouse,* 111 S. W. (2d) 831; *Dodd vs. Dodd,* 15 S. W. (2d) 686.

Second: Oliver Lawther was a non-resident of the State of Maryland because the evidence showed he was an unemancipated minor at the time of the collision, and under the law of Maryland and Texas, his residence followed that of his father, which was at the time of Lawther's enlistment, Texas, and which was Oklahoma at the time of the collision. *Sudler vs. Sudler,* 88 Atl. 26 (Md.); *Gulf Ry. Co. vs. Lemons,* 206 S. W. 75; *Lanning vs. Gregory,* 99 S. W. 542; *Durrill vs. Robison,* 138 S. W. 107.

Third: Oliver Lawther was a non-resident of the State of Maryland because the evidence showed that at the time of and subsequent to the collision in question, he was stationed as a soldier in the barracks on the Federal reservation at Ft. Hoyle, and even if it be conceded that he resided on such reservation, nevertheless under the Maryland law, he was still a non-resident of Maryland. *Lowe vs. Lowe,* 150 Md. 592, 130 Atl. 729.

It is respectfully submitted that either one of these propositions is controlling and furnishes an adequate,

non-Federal ground supporting the judgment complained of.

It is essential to the jurisdiction of this Honorable Court in reviewing a decision of a state, that it must affirmatively appear from the record not only that a Federal question was presented for decision to the highest court of the state, but that its decision was necessary to the determination of the cause; and that it was either actually decided or that judgment as rendered could not have been given without deciding it. *Lynch vs. People of New York*, 55 S. Ct. 16, 293 U. S. 52. It is submitted that the very contrary appears from this record, for the reasons as set out above.

A Federal question to confer jurisdiction on the Supreme Court of the United States must be a substantial one. *Consolidated Turnpipe Co. vs. Norfolk Ry. Co.*, 33 S. Ct. 605, 228 U. S. 596-603; *Corrigin vs. Buckley*, 46 S. Ct. 521, 271 U. S. 323; *Seaboard Oil Line Ry. Co. vs. Watson*, 53 S. Ct. 32, 287 U. S. 86, and a petitioner asserting the denial of right under the Federal Constitution as grounds for certiorari in the Supreme Court must show denial to it and not some other person. *Liberty Warehouse Co. vs. Burley Tobacco Co-op.*, 48 S. Ct. 291, 276 U. S. 71; *Southern Ry. Co. vs. Josephine King*, 30 S. Ct. 594, 217 U. S. 524; *Standard Stock Food Co. vs. Wright*, 32 S. Ct. 784, 225 U. S. 540; *Jeffrey Mfg. Co. vs. Blagg*, 35 S. Ct. 167, 235 U. S. 571; *Aetna Ins. Co. vs. Hyde*, 48 S. Ct. 174, 275 U. S. 440.

In this cause the Maryland defendant, Oliver Lawther, has at no time asserted he was a resident of Maryland. The petitioner was obligated under its policy to defend him, and with full knowledge of the pendency of the suits, and after receipt of the process served upon Lawther, petitioner refused to defend him, asserting as

ground therefor that Lawther was operating the car of the named assured, Lt. Parker, without the latter's permission. This assertion was resolved against petitioner by the Texas Trial Court jury. After the petitioner refused to defend Lawther and advised him that he would have to provide his own counsel if he desired to defend the Maryland suits, Lawther elected to default, and the suits went to final judgment. Under the terms of the policy sued upon, the respondents, plaintiffs in judgment, acquired rights co-extensive with the insured, Lawther. And therefore, under the law, respondents' rights are co-extensive with the rights which Lawther would have, had he paid off the judgments and instituted these suits against petitioner. It therefore appears that respondents, rather than petitioner, claim through the additional insured, Oliver Lawther; and that which would operate as a waiver or estoppel in his favor would also operate as a waiver or estoppel in their favor in this cause. *Jones vs. Zurich General Acc. & Liab. Co.*, 121 Fed. (2d) 761; *Wheeler vs. Lumbermen's Mutual Cas. Co.*, 5 Fed. Supp. 193; *American Fidelity Co. vs. Williams*, 34 S. W. (2d) 396, 72 A. L. R. 1492.

The rights of respondents as plaintiffs in the Maryland judgments to sue the insurance carrier in Texas upon such judgment is established by the policy provisions quoted, and also by the Texas law. *United Services Automobile Ass'n. vs. Zeller*, 135 S. W. (2d) 161; *Trinity Universal Ins. Co. vs. D. Martini*, 118 S. W. (2d) 901.

It is submitted that not only has petitioner failed to show that Oliver Lawther was denied any rights guaranteed under the Federal Constitution, but that petitioner, under the authorities cited above, is not in position to complain of any denial of right to Oliver Lawther.

It is also submitted that petitioner is indemnitor of Lawther under its policy, and obligated thereby to defend Lawther and pay off any judgment recovered against him up to the limits of such policy. Petitioner therefore being the person ultimately liable, and having received due notice of the pendency of the suits in Maryland, with adequate opportunity to appear and defend them, and having wrongfully refused to appear and do so, is bound by such judgments, in absence of fraud or collusion—the existence of which it does not claim. *Washington Gas Light Co. vs. District of Columbia,* 16 S. Ct. 564, 161 U. S. 316; *Roth Tool Co. vs. New Amsterdam Cas. Co.,* 161 Fed. 709; *Kruger vs. California Highway Ind. Exch.,* 258 P. 602, 48 S. Ct. 141, 275 U. S. 568; *City of Chicago vs. Robbins,* 67 U. S. (2 Black) 418; 17 L. Ed. 298; *Royal Ins. Co. vs. St. Louis Ry. Co.,* 291 Fed. 358; *U. S. Fid. & Guaranty Co. vs. Williams,* 129 Atl. 660 (Md.); *Georgia Cas. Co. vs. Schrepferman,* 122 N. E. 783; *International Ind. Co. vs. Steil,* 30 Fed. (2d) 654; *Automobile Owners Ins. Co. of New Orleans vs. Lawrason,* 136 Southern 57, 52 S. Ct. 196.

Finally, it is submitted that the deposition of Mr. Max Weir was taken by respondents in these Texas causes on September 16, 1938. Mr. Weir is the general Claim Attorney for petitioner and one of petitioner's attorneys in fact. This deposition was taken by respondents to ascertain why petitioner did not pay off the Maryland judgments to the extent of the coverage in its policy. Mr. Weir unqualifiedly went on record in said cause that such failure and refusal was due solely to the claim that Lawther, on the occasion of the collision, was not driving Lt. Parker's car with the latter's permisison. After Oliver Lawther was transferred from Ft. Hoyle, Maryland, to another reservation at Ft. Knox, Kentucky, the

petitioner, by its amended answer filed in this cause in April of 1940, for the first time asserted that Lawther was a resident of Maryland at the time he was served as a non-resident. It is submitted that as alleged in respondents' pleadings cited above, petitioner cannot, in judicial proceedings, take inconsistent positions in conflict with a position formerly taken, to the obvious prejudice of respondents. *Chicago R. I. Ry. Co. vs. Lopez,* 209 S. W. 192; *Sellers vs. Puckett,* 180 S. W. 639; *Amarillo National Bank vs. Sandburn,* 169 S. W. 1075; *Davis vs. McFall,* 168 S. W. 453.

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari is without merit and should be dismissed without jurisdiction, or in the alternative, denied.

Respectfully submitted,

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